

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



75-1132

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

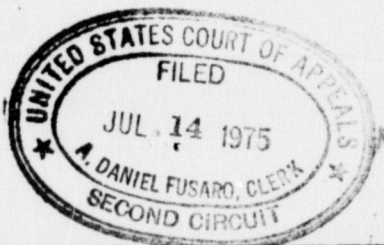
-against-

JOSEPH RACKER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 75-1132

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UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH RACKER,

Defendant-Appellant,

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REPLY BRIEF OF DEFENDANT-APPELLANT

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The following are responses to some of the more important issues raised by appellee in his brief:

1. Contrary to the implications in the responding brief by the United States Attorney to the effect that the appellant concedes that the production contracts were "negotiated" contracts (appellee's brief pp 10, 11, 14, 15, 21), such is not the appellant's position. It was and remains the appellant's position that the production contracts were but amendments and modifications of the original design contracts and as such did not represent separate contracts (appellant's brief pp 25-28).

2. The United States Attorney in his discussion of the validity of the contracts in question does not discuss the legal effect of 10 U.S.C. 2271 as it applies to the instant case, nor does he explain why this most specific statute was not employed by the government for its procurements (appellant's brief pp 19-25).

3. Appellee indicates in his brief that the validity of the contracts under which appellant was prosecuted is "irrelevant" to the case at bar (appellee's brief p 16). However, appellee does not explain how one can be prosecuted for the making of illegal kickbacks under a non-existent contract (appellant's brief pp 19-25).

4. Appellee cites the case of U.S. v Barnard, 255 F. 2d 583 (10th Cir. 1958) cert. denied 358 U.S. 919 (1958), supporting the position, by analogy, that if a contract is procured by both formal advertising and negotiation such a contract falls under the purview of 41 U.S.C. 51-54. It is appellant's position that the Barnard case, supra, is not the controlling law in the instant case. No case can be found which deals squarely with the question here presented. Therefore, resort must be made to the legislative history of the 1960 amendment to the Anti-Kickback Statute (the negotiated-formal advertisement dichotomy was placed in the statute in 1960), and to this court decisions and federal regulations which, if not controlling, are

at least relevant.

The legislative history of the 1960 amendment to the Anti-Kickback Statute is found at 1960 U.S. Code and Cong. and Admin. News, 3292. The amendment was originally submitted by the General Accounting Office (GAO) and the express purpose of the amendment was to extend the prohibition of 41 U.S.C. §51 beyond cost-plus or cost-reimbursable contracts to all types of negotiated contracts with the federal government.

The original 1946 Anti-Kickback Statute was enacted in order to provide the government with a remedy for recovery in the event that a kickback was paid to the holder of a federal cost-reimbursable or cost-plus-a-fixed-fee contract. More importantly to the instant case, the 1946 Act also made it a crime to pay or receive a kickback in connection with such a contract.

However, according to GAO

Since the passage of the act, new types of negotiated contracts have been devised to meet the specialized and complex procurement problems of the Government, in which the element of cost of performance is considered in fixing the contract price in which the contract price may be adjusted upward or downward at completion or during the course of performance on the basis of actual cost experience.

Letter from Comptroller General to Speaker of U.S. House of Representatives, March 22, 1960, 1960 U.S. Code and Cong. and Admin. News, 3292, 3294.

Among these new forms of agreements were the

price-redeterminable contracts which by 1960, had become more prevalent than the cost-reimbursable type of contracts. The price-redeterminable type of contract was not specifically mentioned in the 1946 Act and decisions of three courts conflicted in determining whether a kickback provided in connection with a price redeterminable federal contract was actionable under 41 U.S.C. § 51. In United States v Norris, unreported, (E.D. Pa. April 14, 1956), the district court acquitted defendants indicted under 41 U.S.C. § 51, deciding that a price redeterminable contract which provided only for prospective price revisions was not a cost-reimbursable type of agreement, and was, therefore, not within the Act. The court added, however, the recommendation that Congress Act to expand 41 U.S.C. in order to bring price redeterminable contracts within the purview of the statute.

In Hanis v United States, 246 F. 2d 781 (8th Cir. 1959), the U.S. Court of Appeals for the Eighth Circuit held that knowledge of the cost-reimbursable character of the contract in connection with which a kickback was made was not an essential element of the offense. Although the defendant did not raise the issue of whether the fixed price contract with price redetermination provisions was within the province of 41 U.S.C. §51, the court considered such a contract as of the cost-reimbursable-type within the meaning of the 1946 Act.

One year prior to Hanis, however, the U.S. Court of Appeals for the Tenth Circuit held that the Act applied to price

redeterminable contracts which provided for both retrospective and prospective price revisions. United States v Barnard, supra.

In Barnard, supra, various defendants were indicted for conspiracy to violate 41 U.S.C. §51, 52 and 54. These defendants conspired to bribe employees of the prime contractor to induce the award of various subcontracts. The prime contract with the United States was a fixed price contract with a price redetermination clause.

The defendants moved to dismiss the indictments on the ground that the indictments were fatally defective in failing to allege the existence of a "cost-plus-a-fixed fee or cost reimbursable basis" contract (the type of contracts covered by the statute prior to 1960). The District Court sustained the motions to dismiss. The Court of Appeals reversed, stating that despite much indicia in the prime contract to the effect that it was for a fixed price, the contract provided for various unlimited price redeterminations which were to be negotiated. The court found:

In other words, the provision reasonably contemplated that in the course of renegotiation and revision in prices for items theretofore delivered, reimbursement for costs incurred would be made in some instances. Not only did the provision contemplate reimbursement for costs in some instances, but the expressed obligation resting upon the Government to negotiate in good faith respecting revisions in prices for items theretofore furnished impliedly required the Government to reimburse the prime contractor for costs incurred when the facts justified reimbursement. When all of the provisions in the contract are considered together as constituent parts of a harmonious whole, it cannot

be said that the contract was exclusively a fixed price contract as distinguished from a cost reimbursable basis contract. It partook of both aspects. It was in substance and effect a fixed price and "other reimbursable basis contract." And partaking in part of an "other reimbursable basis contract," it came within the range of section 51, *supra*.

It is appellant's position that the production contracts are modifications and amendments of the original design contracts (see Point IC of appellant's brief). The testimony and evidence adduced at the hearing indicate the production contracts were fixed price incentive and firm fixed price contracts. (Exs.1-9) These amendments did not require re-negotiation for unlimited price redetermination as discussed in Barnard, *supra*, or any other obligation of the government to negotiate. The amendment provided for a fixed formula of either additional payments by the government or a rebate to the government as an adjustment of the original fixed price design contracts cost projections. (A 123/131, 134/156).

The Federal Procurement Regulations which apply to procurement by formal advertising provide that an advertised contract must be of the fixed price type. 41 C.F.R. 1-2.104 states:

Procurement contracts awarded after formal advertising shall be of the firm fixed-price contracts with escalation may be used where some flexibility is necessary and feasible.

41 C.F.R. 1-2.104-3 provides:

Escalation clauses are not normally desirable, but in appropriate cases clauses providing for upward and downward revision

of prices may be used, in accordance with § 1-3.404.3, in order to protect the interest of both the Government and contractor. In addition, where the contracting officer, on the basis of his knowledge of the market or previous advertisements for like items, expects that a requirement for firm fixed-price bids will unnecessarily restrict competition or unreasonably increase bid prices, invitations for bids may include an escalation clause approved by the agency concerned. Any escalation clause shall provide an escalation ceiling identical for all bidders so that each bidder is afforded an equal opportunity to bid on the escalation basis.

These above-cited sections clearly do provide, however, for procurement by formal advertisement which may involve price escalations in the resulting contract. 41 C.F.R. 1-2.103, supra, states that if the contract has been made in accordance with the bidding requirements for advertised contracts, then a contract shall be deemed as having been made by formal advertisement.

41 U.S.C. §§51-54 are penal statutes. A penal statute "cannot be enlarged by implication or intendment beyond the fair meaning of the language used. United States v Barnard, supra, at 587. 41 U.S.C. §§ 51-54 exclude contracts procured by formal advertisement from coverage. Reading the above statutes and regulations together, it appears that if a contract such as the one described in 41 C.F.R. 1-2.104.3 supra, is made by formal advertisement, the fact that the price may be revised at a later time will not bring the contract within the statute.

In sum, 41 U.S.C. §§ 51-54 apply to contracts which are procured by negotiation rather than by formal advertisement. A contract, once procured by formal advertisement cannot at some later time become a contract procured by negotiation. Changes in a formally advertised contract which are effected because of an escalation clause, present in the bidding documents, or because of a change order, cannot be said, in 41 U.S.C. §§ 51-54, to transform that formally advertised contract into a negotiated contract, within the plain meaning of Federal Procurement Regulations or the Anti-Kickback Statute.

5. Appellee discusses in Point II the question of appellant's right to a jury trial. Appellee's argument totally ignores the legal arguments raised concerning appellant's right to a jury trial. One, by necessity, must conclude that appellee is conceding this point.

6. A similar situation with respect to Point III of appellee's brief is evident. Appellee totally ignores the fact that the basic issues presented to this Court and to the Court below involves the subpoenaed items. Appellee's entire argument rests upon the erroneous conclusion that appellant concedes that the production contracts were "negotiated. As

indicated above in Paragraph numbered "1", such is not appellant's position.

Respectfully submitted,

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